No. 12036

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

VICTOR J. VEATCH,

Appellant,

vs.

WILLIAM BORTHWICK, Tax Commissioner of the Territory of Hawaii,

Appellee.

APPELLANT'S BRIEF

Upon Appeal from the Supreme Court for the Territory of Hawaii.

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Subject Index

Table of Authorities Cited

Statutes and Miscellaneous Citations

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STATEMENT OF JURISDICTION

This is an appeal from a judgment of the Supreme Court of the Territory of Hawaii affirming the judgment of the District Court of Ewa, County of Honolulu, Territory of Hawaii, in which the constitutionality and applicability of the Territory's Com-

pensation and Dividends Tax Law as applied to federal employees living and working on military reservations of the United States in the class of appellant, is challenged.

It is respectfully submitted at the very outset that the facts of the instant appeal are sufficiently different from the *Yerian* case decided by this Court (130 F. 2d 786) as to warrant independent and careful consideration.

The jurisdiction of this Court to review said judgment of the Supreme Court of the Territory of Hawaii is sustained by Section 1293 of the new Judicial Code; this case being one in which "the Constitution, laws or treaties of the United States or any authority exercised thereunder" is involved.

STATEMENT OF THE CASE

Appellant is a civilian employee of the United States Army, working and living on Hickam Field, Oahu, Territory of Hawaii, a military reservation of the United States. (Agreed Statement of Facts, points 1 and 4, T-12.)

He is a citizen of, and domiciled in, the State of Colorado, and has paid taxes to the State of Colorado, on the same income sought to be taxed herein by the Territory of Hawaii. (Agreed Statement of Facts, points 2 and 5, T-12, 13.)

Civil suit was brought in the District Court of

Ewa, County of Honolulu, Territory of Hawaii, by the Tax Commissioner of the Territory of Hawaii, against appellant, for taxes claimed to be due and owing by virtue of the Compensation and Dividends Tax Law of the Territory of Hawaii. (Chapter 98, Revised Laws of Hawaii, 1945.) (T-15-17.)

A demurrer was filed in behalf of appellant challenging the applicability of said tax law to appellant and setting forth 16 points of objection. Said demurrer was overruled and the case submitted on an agreed statement of facts. (T-17-22.) Judgment was entered against appellant and the case appealed on points of law to the Supreme Court of the Territory of Hawaii. (T-15-17, 25.)

The judgment of the lower court was affirmed by the Supreme Court of the Territory of Hawaii. (T-47.)

Appeal was duly perfected to this Court.

While appellant in the lower courts saw fit to urge 16 points wherein the applicability of said tax law as applied to him was challenged, appellant herein elects to stand on only one of those objections, and for purposes of squarely raising the one issue that is involved herein the problem can be reduced to but one question: Does the Territory of Hawaii have jurisdiction or power to tax persons in the class of appellant? Only such points as were urged below having relevancy to this question will be argued herein.

SPECIFICATION OF ERRORS RELIED UPON

1. The Supreme Court of the Territory of Hawaii erred in affirming the judgment of the District Court of Ewa, County of Honolulu, Territory of Hawaii, and in failing to set aside and vacate the judgment of said district court. (Assignment of Errors No. 1, T-49, 50.)

2. The Supreme Court of the Territory of Hawaii erred in failing to rule that the appellant is a federal employee, living on land reserved for purposes of the United States Army and working on a military reservation, and hence is not subject to the jurisdiction of the Territory of Hawaii in connection with matters arising out of such employment. (Assignment of Errors No. 4, T-50.)

(a) The Supreme Court erred in failing to rule that a federal employee is not subject to taxation by the Territory of Hawaii on compensation received for personal services performed by him for the United States Government in the absence of specific authority or consent granted either in the Organic Act or by other act of Congress. Nothing in the Organic Act for the Territory of Hawaii, nor any other act of the Congress of the United States specifically grants unto the Territory of Hawaii such power of taxation. (Assignment of Errors No. 6, T-50, 51.)

(b) The Supreme Court erred in failing to rule that under said tax law the Appellant is deprived of property without due process of

law in violation of the 5th and 14th Amendments to the Constitution of the United States in that said tax is imposed without regard to whether or not the taxpayer is already so subject to taxation by the state of his domicile. (Assignment of Errors No. 13, T-52.)

SUMMARY OF ARGUMENT

For purposes of simplicity, the specifications of error relied upon hereinabove, can be reduced to but one contention:

THE TERRITORY OF HAWAII DOES NOT HAVE POWER TO TAX AN EMPLOYEE OF THE UNITED STATES ARMY LIVING AND WORKING ON A MILITARY RESERVATION OF THE UNITED STATES WHERE IN POINT OF FACT SAID EMPLOYEE IS A CITIZEN OF AND DOMICILED IN ANOTHER STATE.

Appellant's argument will be set forth, therefore, as if there is only one specification of error to be relied upon.

ARGUMENT

THE TERRITORY OF HAWAII DOES NOT HAVE POWER TO TAX AN EMPLOYEE OF THE UNITED STATES ARMY LIVING AND WORKING ON A MILITARY RESERVATION

OF THE UNITED STATES WHERE IN POINT OF FACT SAID EMPLOYEE IS A CITIZEN OF AND DOMICILED IN ANOTHER STATE.

That the Territory of Hawaii does have a general power of taxation by virtue of Section 55 of the Organic Act to Provide a Government for the Territory of Hawaii, 48 U.S.C.A., Sec. 562, is not a matter of question in this argument; but it is axiomatic that:

> "The taxing power of a state is limited to persons and property within and subject to its jurisdiction."
>
> 37 Cyc. 718

Nor is the question being posed as to whether or not congressional consent to the taxation of federal employees if the taxing authority had the *"jurisdiction to tax such compensation"* was given by the Public Salary Tax Act, 5 U.S.C.A., Sec. 84a, as follows:

> "The United States hereby consents to the taxation of compensation received after December 31, 1938, for personal service as an officer or employee of the United States, any Territory or possession or political subdivision thereof, the District of Columbia, or any agency or instrumentality of any one or more of the foregoing, by any duly constituted taxing authority *having jurisdiction to tax such compensation,* if such taxation does not discriminate against such officer or employee because of the source of such compensation." (Italics added.)

That was ruled upon in the case *Yerian v Territory of Hawaii,* 130 F. 2d 786. It is therefore to be presumed that the Territory of Hawaii does have certain powers to tax and has power to tax federal employees, if the Territory *otherwise* has jurisdiction to tax such persons, but it is respectfully submitted that the Territory of Hawaii does not have the power to tax federal employees, living and working on military reservations, who do not otherwise come under its jurisdiction.

In Senate Report No. 112, 76th Cong. 1st. Sess., p. 11, it was clearly set forth that the real purpose of the Public Salary Tax Act was to "facilitate the reciprocal taxation as between State and Federal Governments."

"Under this provision, if any local governmental units have authority to and do impose income taxes, tax may be imposed *upon such compensation subject to the jurisdiction of such units.*" (Italics added.)

The report continues:

> *"The consent is not intended to operate, nor could it operate, as a consent to any taxation to which as individuals these officers and employees are entitled to object whether under the provisions of the Federal Constitution or of the Constitution or statutes of the respective states.*
>
> *"For example, the consent has no effect upon the rights of an officer of the federal government to object . . . thus he may urge that a particular tax is invalid as to him because of an unreason-*

able classification or the lack of . . . jurisdiction to tax, or for other reasons." (Op. cit. P. 12.) (Italics added.)

Moreover, it is urged that Public Law 819 (54 Stat. 1059, 4 U.S.C.A., Sec. 14) and reenacted by Public Law 279, (61 Stat. 641, 4 U.S.C.A., Sec. 106) does not extend any jurisdiction over the person of a federal employee not otherwise subject to such jurisdiction simply by force of its provisions:

> "No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any federal area within such state to the same extent and with the same effect as though such area was not a Federal area."

As is pointed out in Senate Report No. 659, 80th Cong., p. 9, Sec. 108 of the Act must be taken into consideration:

> "The provisions of Sections 105 to 110 of this title shall not for the purposes of any other provision of law be deemed to deprive the United States of exclusive jurisdiction over any Federal area over which it would otherwise have exclusive jurisdiction or to limit the jurisdiction of the United States over any Federal area."

And so — it is respectfully submitted that insofar as this particular appellant (and persons similarly situated) is concerned there is still one question to be answered. Does the Territory of Hawaii have jurisdiction over him, and if not — can it pass a tax law effective as against him?

The principal case which seems to have been brought to the attention of the Supreme Court of the United States, apparently analagous to the case at bar, is *Kiker v City of Philadelphia,* 31 A. 2d 289, 346 Pa. 624, which was denied certiorari to the Supreme Court of the United States, 320 U.S. 741, 64 S. Ct. 41, 88 L. Ed. 439. As the background for this denial of certiorari is not given, it might reasonably be concluded that it might have been based upon any one of a number of other points and not necessarily the point at issue here. It is sufficient to note that the precise question that is raised here has not been treated by the Supreme Court of the United States, although the adjudication involves the interpretation of federal statutes and involves the relationship of a federal and state (territorial) and interstate jurisdictional question.

It is our belief, and on that point it is respectfully urged that the dissenting opinion by Mr. Chief Justice Maxey in *Kiker v Philadelphia* (supra) represents the more nearly correct view, and that the matter should be re-considered and the final point of jurisdiction made clear.

But even the majority opinion of the *Kiker* case is not necessarily in bar of appellant's position. It

reaches its conclusion by a line of reasoning not possible in the instant case and places an emphasis upon our dual system of government, by virtue of which the national government cannot run roughshod over the state governments. In the case of a territory, there is no inherent sovereignty to respect. Sovereignty over the entire territory is already established in the federal government and the federal government alone.

When the Republic of Hawaii ceded all rights of sovereignty to the United States upon annexation as a territory (Joint Resolution No. 55, 55th Cong., 2nd Sess., 30 Stat. 750) and subsequently thereto the United States acquired portions of such areas as military reservations, the argument for exclusive jurisdiction over said areas became even stronger than that which obtains where land is acquired by purchase from a state. For in the latter instance a state has a right to bargain with the United States relative to which rights it might desire to retain, while in the former instance the entire area is under jurisdiction of the United States, and remains so until *specific* congressional action dictates otherwise.

Even in the case of *Rivera v Buscaglia,* 146 F. 2d 461, which upheld the Puerto Rican legislature taxing the compensation of federal employees, it was said:

> "It may be conceded that the power of a dependency to tax its sovereign will not readily be implied, and that the grant by Congress to the legislature of Puerto Rico of a general power to

> tax should not be construed as consent to the imposition of taxes on the United States itself or any of its agencies or instrumentalities."
>
> (p. 463.)

And in the case of *Fort Leavenworth R.R. v Lowe,* 114 U.S. 525, 526, 5 S. Ct. 995, 29 L. Ed. 264, it was said:

> "The land constituting the reservation was part of the territory acquired in 1803 by cession from France, and, until the formation of the State of Kansas, and her admission into the Union, the United States possessed the rights of a proprietor, and had political dominion and sovereignty over it. For many years before that admission it had been reserved from sale by the proper authorities of the United States for military purposes, and occupied by them as a military post. *The jurisdiction of the United States over it during this time was necessarily paramount."* (Italics added.)

Jurisdiction is "coextensive with authority and sovereignty."

> *United States v Motohara,* 4 U.S. Dist. Ct. Hawaii, 62, 65.

Admitting then the sovereignty of the United States over duly organized territories, such as the Territory of Hawaii, it must follow that as soon as the federal government uses any land within such territory for military reservations, then *ipso facto* the territory is ousted of jurisdiction over such areas, in

the absence of specific congressional action to the contrary.

It is noteworthy in this connection to recall the case of *Lowe v Lowe,* 133 A. 729, 150 Md. 592, 46 A.L.R. 983, 988, wherein the status of civilian employees living on military reservations has been ably set forth:

> "The great weight of authority is to the effect that lands acquired in accordance with the provisions of the Federal Constitution cease to be a part of the state, and become Federal territory, over which the Federal government has complete and exclusive jurisdiction and power of legislation. It is therefore clear that persons residing at Perry point are not residents of the state of Maryland . . . for taxation purposes, . . . for the reason that they reside upon territory belonging to the United States and not the state of Maryland; and in our opinion, for the same reason, they are not such residents of the state as would entitle them to file a bill for divorce in any of the courts of the state. It might be said that it is an unfortunate situation, where by reason of the fact that the Federal government has failed to make provision for such cases, residents upon such reservations are left without any remedy; but it is a condition wherein the only relief which can be given is by the Federal Congress."

This doctrine has been followed in the Territory of Hawaii, relying on *West v West,* 35 Haw. 461, in which it was ruled that military personnel living off their reservations could establish domicile for pur-

poses of divorce, upon proof of proper intention to form a new domicile and, by analogy, that persons living on military reservations could not establish residence for the basis of divorce unless they had already become subject to the jurisdiction of the Territory. Quoting from this case:

> "At no time since his arrival in Honolulu has he resided either on a ship or upon the naval reservation. On the contrary, he has continuously resided off the naval reservation, in rented property in Honolulu, and at the time of the hearing in this case he was residing at the address given in his changed service record. *He has never paid a poll tax or other tax here or elsewhere.* (Italics added.) He has never registered or attempted to register as a voter here and testified that he has never voted anywhere. . . . He further testified that when he left Boston to reenlist, he had a fixed intention of abandoning any other home he had for the purpose of making Hawaii his home and permanent domicile, and has kept that intention ever since. . . .
>
> (p. 463, 464.)

> "We think that both reason and authority support the following conclusions: (1) That an officer or enlisted man, when permitted to establish a home outside of his military or naval station, may thus acquire a domicile but cannot acquire a domicile when required to reside in quarters furnished by the government on a military or naval station; . . ."
>
> (p. 472.)

Similarly it has been held that civilians residing on military reservations are subject to the same regulations. This is substantially the doctrine of *Lowe v Lowe,* supra, which states again on p. 989,

> "... They (persons residing on government reservations) are not subject to jury duty; neither can they be taxed for the maintenance of the state government, including the courts ..."

This doctrine is not opposed in any respect to that set forth in *Fort Leavenworth R.R. Co. v Lowe,* 114 U.S. 525, 532, 533, which states:

> "When the title is acquired by purchase by consent of the legislatures of the states, the federal jurisdiction is exclusive of all state authority. This follows from the declaration of the constitution that congress shall have 'like authority' over such places as it has over the district which is the seat of government; that is, the power of 'exclusive legislation in all cases whatsoever.' Broader or clearer language could not be used to exclude all other authority than that of congress; and that no other authority can be exercised over them has been the uniform opinion of federal and state tribunals, and of attorneys general."

It has been shown supra that Congress did not intend that persons living on military reservations could be taxed without the right of objection. It is reiterated here again that the right of taxation is only extended when the state could establish jurisdiction, and as was said before, a Territory has an

even greater burden of proof than a state. It is therefore respectfully submitted that notwithstanding Public Law 819, the doctrine expressed in *Lowe v Lowe,* supra, is still applicable.

It is further respectfully submitted that notwithstanding the Public Salary Tax Act, Public Law 819, the *Yerian,*[1] *Graves,*[2] *Shaffer*[3] and similar cases, the responsibility still remains on the Territory of Hawaii to establish that it has jurisdiction over the appellant before its tax laws can be imposed upon him.

It is important also that Public Law 819 is not a positive law creating new power. It merely serves to remove certain restrictions relative to the taxation of salaries of persons residing on military reservations by taxing authorities who can establish jurisdiction over the person sought to be taxed.

The taxing power of a Territory might be considered to be comparable to that of a state — but only insofar as persons domiciled in that Territory are concerned.

In the case at bar we have a person in the employ of the United States Army, living and working in an area specifically set aside for the exclusive use of the United States Army. In such a case, it is respectfully submitted that we have the relationship of dependent to sovereign, and that a general grant of taxation will not suffice to confer jurisdiction to tax persons

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[1] supra.

[2] *Graves v People of New York ex rel O'Keefe,* 306 U.S. 466, 59 S. Ct. 595, 83 L. Ed. 927, 120 A.L.R. 1466.

[3] *Shaffer v Carter,* 252 U.S. 37, 40 S. Ct. 221, 64 L. Ed. 445.

so situated. Nothing less than a specific act of Congress will suffice.

> "Puerto Rico, an island possession, *like a territory* (italics added), is an agency of the federal government, having no independent sovereignty comparable to that of a state in virtue of which taxes may be levied.
>
> "A territory or a possession may not do so (tax a federal instrumentality) because the dependency may not tax its sovereign. True, the Congress may consent to such taxation; but the grant . . . of such a general power to tax should not be construed as consent. Nothing less than an act of Congress clearly and explicitly conferring the privilege will suffice."
>
> *Domenech v National City Bank,* 294 U.S. 199, 204, 205, 55 S. Ct. 366, 79 L. Ed. 857.

It is important to note also that appellant has not come to the Territory of Hawaii to take up a permanent residence. Appellant was not sent into the Territory of Hawaii but to a military reservation of the United States, by the United States Army in a manner similar to that which obtains in the transferring of personnel in the armed forces. Appellant is subordinate to the United States Army — and it follows that he can be subject to transfer to areas further across the Pacific or even to some station on the mainland of the United States.

During his entire stay on the military reservation, he has maintained his home in the state of Colorado; owns his own home there; pays real estate and personal property taxes there; *has paid taxes on the same*

income sought to be taxed herein; and is domiciled in and a citizen of the state of Colorado.

(Agreed Statement of Facts Nos. 5, 6; T-13.)

It is respectfully urged that in view of the special facts of this instant case only one taxing jurisdiction (other than the federal) can tax appellant's income and that is the state of Colorado and not the Territory of Hawaii.

Appellant is subject to the jurisdiction of the state of Colorado — and it is urged that it then must follow that he cannot be also subject to the jurisdiction of the Territory of Hawaii.

> " 'We take it to be a point settled beyond all contradiction or question that a state has jurisdiction of all persons and things within its territory which do not belong to some other jurisdiction . . .' *Coe v Errol,* 116 U.S. 517, 524. It is a corollary of this principle that a state has no jurisdiction over any person or thing over which another sovereign power has exclusive jurisdiction."
>
> From dissenting opinion *Kiker v City of Philadelphia,* 31 A. 2d 289, 298.

Chief Justice Marshall, in *McCullough v Maryland,* 17 U.S. 316, 4 Wheat. 316, 429, had this to say on the subject:

> "All subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self evident."

It is therefore respectfully urged that the doctrine of *Coe v Errol,* 116 U.S. 517, 6 S. Ct. 475, 29 L. Ed. 715, to the effect that a state can have jurisdiction only over persons and things within its territory which do not belong to some other jurisdiction (supra) is in point. It is this doctrine that impels a consideration that under the special circumstances and facts of the instant case, appellant is not subject to the jurisdiction of the Territory of Hawaii for tax purposes on compensation derived from the United States Army and earned on a military reservation, on the Territory of Hawaii, where in point of fact appellant came to said military reservation from another state; did not lose his citizenship and domicile in that other state; and is already subject to that state's jurisdiction for purposes of taxation on the same income sought to be taxed herein.

CONCLUSION

It is our contention that the judgment and decision appealed from should be reversed.

Dated at Honolulu, T.H., this 15th day of December, 1948.

Respectfully submitted,

/s/ Hyman M. Greenstein

HYMAN M. GREENSTEIN,
Attorney for Victor J. Veatch, Appellant.

Due service and receipt of 5 copies of the within is hereby acknowledged this 15th day of December, 1948.

(s) Rhoda V. Lewis
assistant

Attorney General of the Territory of Hawaii
Counsel for Appellee.